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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 75

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, and Girard Trust Company, Trustees Under the Will of William B. Butterworth, Deceased

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 9–17) is reported in 23 B.T.A. 838. The opinion of the Circuit Court of Appeals (R. 21–26) is reported in 63 F. (2d) 944.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 3, 1933. (R. 27.) The peti-

tion for a writ of certiorari was filed May 17, 1933, and was granted May 29, 1933. (R. 27.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the decedent's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 27–28.

STATEMENT

The facts found by the Board of Tax Appeals (R. 9–10) were not controverted and are in substance as follows:

William B. Butterworth died on October 5, 1921. By his will he disposed of certain personal belongings and then provided as follows (R. 9):

> Third: All the rest, residue, and remainder of my estate, real, personal, mixed, whatever and wheresoever, I give, devise, and bequeath unto my trustees hereinafter named, in trust to invest and keep invested * * *, and to pay over the net income arising therefrom to my said wife,

> Julia Butterworth, for and during the full term of her natural life * * *.

Provision was made for the disposition of the corpus of the estate after the death of the widow. (R. 9.)

During 1924 and 1925 (the years here involved) the trustees paid the income to the widow pursuant to the terms of the will. The amount thus distributed, together with amounts distributed to the widow in prior years, did not equal in the aggregate the value of the interest to which the widow would have been entitled had she elected to take against the will. (R. 9–10.)

In computing the taxable income of the estate for the years involved the respondents deducted from gross income the amounts distributed to the widow. (R. 10.) The Commissioner disallowed the deductions thus claimed and asserted deficiencies accordingly. The Board of Tax Appeals approved the Commissioner's action. The court below, with one judge dissenting, reversed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income as such and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by testamentary trustees

to a widow who has elected to take under the will, is deductible by the trustees although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by respondents to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

The Treasury Department at first endeavored to maintain the position that distributions made to a widow who elected to take under the will in lieu of her dower or statutory interests in the estate of her deceased husband was taxable to her. Decisions to the contrary were, however, reached in *Warner* v. *Walsh,* 15 F. (2d) 367 (C.C.A. 2d), *United States* v. *Bolster,* 26 F. (2d) 760 (C.C.A. 1st), and *Allen* v. *Brandeis,* 29 F. (2d) 363 (C.C.A. 8th). In deference to these decisions, the Government receded from its earlier position and announced its acceptance of the principle of these cases. The Treasury ruled, however, that if the widow was not taxable on such distributions of income, the trustee was. The endeavor to maintain the position so taken has given rise to the present cases.

II

If the widow is not taxable on the payments until her "capital" has been returned in full, the trustee should not be allowed to deduct the payments made to her as "income" distributed to a "beneficiary". The purpose of Congress in enacting Section 219 of the Revenue Acts of 1924 and 1926 (*infra,* p. 27) seems plain. All income accruing to property held in trust is made subject to tax. This tax is payable primarily by the trustee but in certain circumstances, when the beneficiary is subject to tax, the trustee is authorized to deduct from its taxable income the amount of income which is taxable to the beneficiary. This purpose should not be thwarted unless the reasons are compelling.

It seems apparent that Congress did not intend to create an exemption in favor of income distributed to widows. This Court has frequently announced the rule that nothing is taken by inference or presumption in favor of an exemption. Moreover, when the statute as an entirety is considered, there is no escape from the conclusion that Congress did not intend to provide for deductions by the trustee under the circumstances here disclosed.

We contend that the court below gave too broad a construction to the word "beneficiaries" in the statute. The wording of the statute as a whole makes it plain that Congress intended the word "beneficiaries" to include only those who not only

received distributions of trust property but who also are subject to tax on these distributions. This construction has been specifically adopted by this Court in *Burnet* v. *Whitehouse,* 283 U.S. 148, 151. Any other construction of the word would make a portion of the statute unconstitutional, for Congress has provided that payments deducted by the trustee "shall be included in computing the net income of the beneficiaries." If the payments in question are returns of capital and not income, Congress had no constitutional power to provide that they should be taxed to the recipient. To accept the broad construction of the word "beneficiaries" adopted by the court below is, therefore, to make this portion of the statute unconstitutional. The narrow construction of the word, confining it to those in whose hands the payments are taxable, is not only possible here but was obviously intended by Congress.

III

Although we contend that if the payments in question are not taxable to the widow they cannot be deducted by the trustee, we submit that the position originally taken by the Treasury was correct, and that the payments should be held taxable to the widow. Since the decisions of the three Circuit Courts of Appeals which rejected the Government's contention that the widow was taxable, two other courts have considered the same question and have reached the conclusion that the Government's

original position was correct. *People ex rel. Kight* v. *Lynch,* 255 N.Y. 323; *Title Guarantee Loan & Trust Co.* v. *Commissioner,* 63 F. (2d) 621, now pending as *Helvering* v. *Title Guarantee Loan & Trust Co.,* No. 78, present Term.

We submit that the decisions in these two cases are sound. The widow does not "purchase" in any true sense; she "elects." Moreover, even if she is regarded as a purchaser, what she has purchased is an equitable life estate in property, and the income from that estate should be held taxable to her just as would be the income from any other property she might have purchased.

If this contention is sustained, it follows as a consequence that the trustee is entitled to deduct the payments made and that the result of the decision below is correct, at least if the widow does in fact pay the tax on the income she receives.

ARGUMENT

This and the companion cases, Nos. 76, 77, and 78, present the question of the proper interpretation of Section 219 of the Revenue Acts of 1924 and 1926, as applied to cases arising where trust distributions are made to a widow who elects to take under the will of her deceased husband in lieu of dower or statutory rights. The courts in each of these cases have held that the trustee is entitled to a deduction in respect of such distributions.

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I

PRELIMINARY STATEMENT

The Treasury Department at first endeavored to maintain the position that distributions made to a widow who elected to take under the will in lieu of her dower or statutory interests in the estate of her deceased husband were taxable to her. This course was believed to conform to the decision of this Court in *Irwin* v. *Gavit*, 268 U.S. 161. It was the view to which the District Court subscribed in *Warner* v. *Walsh*, 10 F. (2d) 155 (D. Conn.).

In the *Warner case* a large trust fund was created under the will of the taxpayer's deceased husband, from which she was to receive $50,000 per year for life, payable out of income and if necessary out of principal. This provision was made and accepted by the widow in lieu of her statutory rights in her husband's estate under the laws of Connecticut. She paid Federal income tax on the sums distributed in each of the years 1917 and 1918 and subsequently brought suit to recover this tax. The Circuit Court of Appeals, reversing the court below, held that the widow should be treated as the purchaser of annuities by the relinquishment of her statutory rights in her husband's estate and that no tax should be collected from her until the aggregate annual payments equalled the purchase price (15 F. (2d) 367 (C.C.A. 2d)). The basis of the court's decision appears in the following quotation from its opinion (p. 368):

> * * * For what we have here is, in fact and in legal effect, the purchase of an annuity, in no way differing from an annuity purchasable by the widow from an insurance company, with the proceeds of her statutory rights in the estate, except only that in such a purchase she would have an unsecured obligation, whereas here the obligation is secured by the income and principal of the trust fund. That such a relinquishment of dower rights is a purchase of the will provision is well and long established. * * *[1]

These views were followed in *United States* v. *Bolster*, 26 F. (2d) 760 (C.C.A. 1st), where a surviving widow received substantial distributions of income under the will of her deceased husband, the provision being made and accepted by her in lieu of her dower rights under Massachusetts law. The annual payments in the *Bolster case* were not annuities but the Court nevertheless applied the rule laid down in *Warner* v. *Walsh, supra,* and held that

[1] The Circuit Court of Appeals for the Second Circuit has recently had occasion to determine the taxable status of distributions to the same widow which were made after the value of her surrendered dower rights had been fully returned. *Warner* v. *Commissioner*, decided July 17, 1933, not yet reported but may be found in 333 C.C.H. 9169. These payments were held to be exempt as having been acquired by bequest. While the court indicated that its earlier decision in *Warner* v. *Walsh* was not overruled, it is believed the reasoning of that case has not been carried to its logical conclusion in the more recent decision. The Government has filed a petition for certiorari in that case No. 499, October Term, 1933.

the widow was the purchaser of the annual payments to the extent of the value of her statutory interests in her husband's estate as of the date of his death.

This position was further supported by *Allen* v. *Brandeis*, 29 F. (2d) 363 (C.C.A. 8th). In that case the decedent provided for an annual payment of $50,000 to his wife for life in lieu of her statutory interest in his estate. This sum was payable from income and subject to diminution in the event of insufficient current income. The widow elected to take under the will. The court, following *Warner* v. *Walsh* and *United States* v. *Bolster*, both *supra*, held that the widow purchased the annual payments by relinquishment of her statutory interest in her husband's estate and that she should not be required to pay income tax on the annual payments received until the capital invested in the annuities had been returned to her.

In deference to the uniform authority of three decisions of as many Circuit Courts of Appeals, the Government reluctantly receded from its earlier position and announced its acceptance of the principle of these decisions in two rulings of the Treasury Department.[2] The Treasury ruled, however, that if the widow was not taxable on such distributions of income the trustee was. The endeavor to enforce the position so taken has given rise to the present cases.

[2] I.T. 2506, VIII–2 Cumulative Bulletin 129; I.T. 2480, VIII–2 Cumulative Bulletin 141.

II

IF THE WIDOW IS NOT TAXABLE ON THE PAYMENTS UNTIL HER "CAPITAL" HAS BEEN RETURNED IN FULL, THE TRUSTEE SHOULD NOT BE ALLOWED TO DEDUCT THE PAYMENTS MADE TO HER AS "INCOME" DISTRIBUTED TO A "BENEFICIARY"

The earliest income tax act did not recognize a trustee as a "taxable person." *Smietanka* v. *First Trust & Savings Bank*, 257 U.S. 602. This defect was remedied in the Revenue Acts of 1916 and 1917 (*Merchants Loan & Trust Co.* v. *Smietanka*, 255 U.S. 509), and by the time the Revenue Act of 1924 was enacted the provisions relating to estates and trusts had been developed into a comprehensive scheme, the obvious purpose of which was that all income received by estates and trusts should be subject to tax. Section 219 (a) of the Revenue Acts of 1924 and 1926 (*infra*, p. 27) specifically provides that the income tax provisions—

> shall apply to the income of estates or of any kind of property held in trust, including—
>
> * * * * *
>
> (2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *;

Section 219 (b) of both Acts provides that in such cases—

> the tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary. The net income of the

> estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—
>
> * * * * *
>
> (2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.

The purpose of Congress in enacting this provision seems plain. All income accruing to property held in trust was made subject to tax. This tax was payable primarily by the trustee but in certain circumstances, when the beneficiary was subject to tax, the trustee was authorized to deduct from its taxable income the amount of income which was taxable to the beneficiary. This purpose should not be thwarted, we contend, unless the reasons are compelling.

If we accept as correct the principles announced in *Warner* v. *Walsh, United States* v. *Bolster,* and *Allen* v. *Brandeis, supra,* the income from trust property paid to a widow who elects to take an interest in the trust in lieu of her dower or statutory interest is either taxable in the hands of the trustee, or else it is altogether exempt. It seems apparent that Congress did not intend to create an exemp-

tion in favor of income distributed to widows. Estates and trusts realize income and they have for many years been consistently subjected to tax. Section 219 of the Revenue Act of 1924 was materially changed from the corresponding provisions in the earlier act for the express purpose of preventing the escape of trust income from taxation.[3] Congress expressly provided that income payable to certain classes of beneficiaries, such as charitable organizations, should be exempt.[4] But there is no language in the statute which in any way suggests that income payable to widows is similarly exempt. This Court has frequently announced the rule that nothing is to be taken by inference or presumption in favor of an exemption. *Bank of Commerce* v. *Tennessee,* 161 U.S. 134, 146; *Heiner* v. *Colonial Trust Co.,* 275 U.S. 232, 235; *Pacific Company* v. *Johnson,* 285 U.S. 480.

In reaching its conclusion, the court below disregarded the fact that deductions permitted to trustees are but part of a harmonious plan devised to insure the payment of taxes on all income. The deduction provisions, we submit, must be applied in the light of that plan and any construction which would tend to defeat the purpose of Congress should

[3] House Report No. 179, 68th Cong., 1st Sess., p. 31; Senate Report No. 398, 68th Cong., 1st Sess., p. 25.

[4] Revenue Act of 1918, Sec. 219 (b) (2); Revenue Act of 1921, Sec. 219 (b) (2); Revenue Act of 1924, Sec. 219 (b) (1); Revenue Act of 1926, Sec. 219 (b) (1); Revenue Act of 1928, Sec. 162 (a); Revenue Act of 1932, Sec. 162 (a).

be avoided. When the plan as an entirety is considered there is no escape from the conclusion that Congress did not intend to provide for deductions under the circumstances here disclosed. The deductions allowed to trustees under Section 219 (b) (2) (*infra*, p. 27) are declared by the statute to be additional deductions, and we submit that they may be taken by the trustees only on the condition that the liability for the tax is transferred with the payments.

In its effort to justify a result which is obviously out of harmony with the fundamental purpose of the statute, the court below gave the word "beneficiaries" its most comprehensive meaning. The court held in effect that any person who receives distributions from a trust is a "beneficiary" within the meaning of the statute. (R. 26.) We contend that this construction is too broad. This Court has repeatedly recognized that words must be construed in the light of the setting in which they appear. *Towne* v. *Eisner*, 245 U.S. 418, 425; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 433. We submit that the wording of the statute as a whole makes it plain that Congress intended the word "beneficiaries" to include only those who not only receive distributions of trust property but who receive the distributions as income, taxable as such.

This Court has already adopted the construction of the word "beneficiaries" for which we contend. In *Burnet* v. *Whitehouse*, 283 U.S. 148, it was held

that annuity payments under a will were not taxable to the recipient because the payments were a bequest. In answering the Government's contention that Section 219 made the payments taxable as "income which is to be distributed to the beneficiaries periodically," this Court said (p. 151):

> But clearly enough, we think, this section applies only to income paid as such to a beneficiary.

The widow is not a "beneficiary" of the trust if the payments to her must be regarded as returns of capital; she is a "purchaser," receiving what she has purchased in installments. Congress has expressly provided that the amount allowed as a deduction to the trustee "shall be included in computing the net income of the beneficiaries." But if the recipient of the payment is held to be a "purchaser," the amount received is a return of capital and not income, and Congress had no constitutional power to provide that it should be taxed to the recipient. To accept the broad construction of the word "beneficiaries" adopted by the court below, is therefore to make this portion of the statute unconstitutional. Under these circumstances we submit that the words of the statute must be given a construction which would make it constitutional. *United States* v. *Bennett*, 232 U.S. 299. Such a construction, confining the word "beneficiary" in this phrase of the statute to those in whose hands the payments are taxable, is not only possible here, but was obviously intended by

Congress. When the same word was used earlier in the same sentence in providing that the trustee might deduct payments made to "beneficiaries" we submit that it was intended to have the same construction. It follows, therefore, that the payments to "beneficiaries" which the trustee is authorized to deduct under Section 219 are limited to payments which are made to persons in whose hands the payments are subject to tax.

Our contentions as to the proper construction of Section 219 are directly supported not only by this Court's opinion in *Burnet* v. *Whitehouse, supra,* but also by the decision of the Circuit Court of Appeals for the First Circuit in *Atkins* v. *Commissioner,* 63 F. (2d) 88, which involved the same question as that now before this Court, and was decided in favor of the Government. The court there said (p. 89):

> We think it is apparent from a reading of the provisions of section 219 (a) (2), (b) (2), that Congress did not intend the net income of a trust should escape taxation either in the hands of trustees or in the hands of the beneficiary; that, to the extent that the net income was to be distributed currently to beneficiaries, it was to be taxed to the beneficiaries and a deduction allowed to the trustees in computing their net taxable income, but that, to the extent that distributions were not made to a beneficiary but to a

> purchaser for value, such distributions were not to be deducted in computing the net taxable income of the trust.

The evident intention of Congress to tax the income either to the fiduciary or the beneficiary had indeed been earlier recognized by the same court in *United States* v. *Bolster, supra,* in which the Government sought to collect the tax from the beneficiary. The court there said (p. 763):

> In the instant case we do not have to consider the possibility of the government losing its rightful tax upon income which Congress intended should be taxed. It is not a question of a statute "failing to hit" something which ought to be taxed. Under the statute with which we are dealing a trust is the subject of taxation just as an individual. We think the government must look to the trustee for its tax, and that the trust would clearly be taxable upon this income, if it were not expressly exempted because of its charitable character.

No controversy exists with respect to the classification of the income in question as income in the hands of the trustees. What they seek is a deduction. But the statute permits a deduction only on condition that the one to whom the income is paid shall be responsible for the tax. Since the income of the trust in this case was paid to individuals who are held not accountable for the tax, the condition of the statute is not satisfied and the deduction should be denied.

III

SHOULD THE WIDOW BE HELD TO BE A "PURCHASER" OF THE PAYMENTS SHE RECEIVES?

As has been pointed out, the Government's original position in cases of this class was that the payments of income to the widow were taxable to her and that the trustee was accordingly entitled to a deduction. When the decisions of three Circuit Courts of Appeals did not afford a conflict which could be brought before this Court the Treasury Department was forced to abandon the position it had originally taken. Our contention is, that if the payments are not taxable to the widow, they cannot be deducted by the trustee. But we also submit that the position originally taken by the Treasury was correct, and that the payments should be taxable to the widow. If the Government's original position in this respect was correct, then it follows, of course, that the trustee is entitled to deduct the payments made and that the result of the decision below is correct, at least, if the widow has in fact paid the tax on the income she received.

Since the decisions of the three Circuit Courts of Appeals which rejected the Government's contention that the widow was taxable, two other courts have considered the same question and have reached the conclusion that the Government's original contention was correct. In *People ex rel. Kight* v. *Lynch*, 255 N.Y. 323, the Court of Appeals of New York had before it the question whether

a widow was entitled to a refund of taxes paid on income received from a trust created by her husband's will on the ground that she was a purchaser of the payments. The provisions of the New York State income tax law were identical with those of Section 219 of the Revenue Act of 1924. The court held that the widow was not a purchaser and that she was taxable. The decisions of the three Circuit Courts of Appeals were cited and their conclusion was rejected. The reasoning of the court seems to us so conclusive that we adopt it and present it here as our argument on this question. The court said (pp. 326–328):

> Assuming that Mrs. Kight, in this case, had elected to take her dower instead of under the will, what would be her position and right as well as obligation under the Income Tax Law? If she took a specific piece of real property, which was laid off and admeasured to her, the rents or income from this property would be income, not payments as part of her principal, and would have to be included in the tax return as taxable income. The same ruling would apply if Mrs. Kight received one third of the rental value of the real property annually and for life. These rents would not change their nature from income to principal simply because they were paid to a widow as dower. So, likewise, if she elected to take a gross sum, as the value of her dower life interest, the income from the investment of this money would still be income taxable

under the law. In a word, the income which a widow receives on her dower interest, whichever way she takes it, is income taxable under the law, and not a capital payment in any sense.

What does the widow do, therefore, when she elects to take an income provision from a trust under the will of her late husband? She gives up one taxable income for another income, be it more or less. By what process of reasoning does her election of the substitute income relieve her from the duty to pay a tax or turn the selected income into a capital payment or a purchased annuity? As a fact, and not as a fiction, the income from one third of the deceased's real estate, constituting dower, is the same income in nature, perhaps also in amount, as the income from one third of that estate held in trust for her. This being so, we do not see any reason for exempting from taxation one income and not the other. The Tax Law creates no such exemption.

Neither is it accurate to say that the widow, in giving up her dower, purchases an income or an annuity from the estate. She purchases nothing; she makes an election allowed by law. (Real Prop. Law, § 200.) The estate does not sell, neither does she buy. The statement in *Flynn* v. *McDermott* (183 N.Y. 62), that "a bequest in lieu of dower, and the acceptance of same, amounts to a matter of contract and purchase," means in its application that as dower precedes legacies so should her elec-

tion. The paragraph is not relevant here. When she makes her election she knows, or is presumed to know, that the income which she considers taking under the will is taxable. She does not have to take it; she may reject it; but in considering her election, she is presumed to know that by section 365 of the Tax Law a tax is paid annually on income from any kind of property held in trust, and is to be paid by the beneficiary.

Another consideration moves us. The inchoate right of dower, as heretofore existing, has been abolished, with certain exceptions, and the widow is given, in the absence of a will, one half or one third of the estate outright. A will cannot deprive her of this portion which the law provides for her, but in case of a will, she now has numerous elections. (Laws of 1929, ch. 229, amending the Decedent Estate Law, the Surrogate's Court Act, the Real Property Law, the Civil Practice Act, and the Personal Property Law, generally, in relation to decedents' estates, taking effect September 1, 1930.) Surely, every election made by a widow under this law would not metamorphose income into principal.

That the income from this trust estate is not exempt as a gift or bequest, see *Irwin* v. *Gavit* (268 U.S. 161), which strongly indicates that income remains income, under the Federal Income Tax Act, until it clearly appears to be a return of a capital payment, or the payment of a bequest in installments.

> The same thought follows in *Jones* v. *Commrs. of Inland Revenue* ([1920] 1 K.B., p. 711).

The same conclusion was also reached in *Title Guarantee Loan & Trust Co.* v. *Commissioner,* 63 F. (2d) 621, which is now pending before this Court as *Helvering* v. *Title Guarantee Loan & Trust Co.,* No. 78, present Term. The question involved in that case was the same as here, namely, whether the trustee was entitled to deduct from its income payments made to a widow who took her interest in the trust in lieu of dower. The court held that the trustee was entitled to the deduction, but based its conclusion on its holding that the income in question was taxable to the widow. The court said (pp. 622–623):

> We think Mrs. Woodward is a beneficiary, in the trust, receiving the net income therefrom as income, the tax on which is chargeable to her and not to the trustee. The term "beneficiary" is broadly used in the statute as a correlative to fiduciary, and includes those who are the usees in the trust. What was paid Mrs. Woodward was paid her not in discharge of any monetary obligation due by the trust, but as her share along with her children in its profits. We agree with the multitude of authorities cited in *Re Butterworth,* 23 B.T.A. 838; *United States* v. *Bolster,* 26 F. (2d) 760; and *Allen* v. *Brandeis,* 29 F. (2d) 363, that at the death of her husband this widow had a legal estate in dower in his lands and an undivided one

fourth legal interest in his personalty, and the will in effect made an offer to purchase these from her in consideration of what it gave her; and that in electing to take under the will she took as a purchaser for value and not as a volunteer. But we think the *Bolster Case* and that of *Butterworth* based on it did not sufficiently consider what the widows there involved got; not a money obligation, but an estate in an investment. Had Mrs. Woodward retained her dower in the realty and her fourth interest in her husband's securities, she would have owed taxes on the income she received from them. She exchanged those legal estates for an equitable estate in substantially the same property, but managed for her by a trustee, which she thought preferable. She has changed the form of her investment, but the income from it is still income and paid to her as such by the very words of the will to which she assented. She has no charge on, or debt against, the trust estate. For the sale of her legal rights in her husband's estate she was paid in full by the equitable estate received under the will. Thereafter she was no creditor but the owner of that interest in property, exactly like the interest of each of her children, except that she paid for hers, and theirs presumably was given them. The case is otherwise when the widow sells her rights for money, whether paid in a lump sum, or in installments, or as an annuity. She is in such cases a creditor realizing on the conversion of her property into cash and

> entitled in general to receive her capital before what she gets becomes gain, and especially so when the getting of it is too uncertain to assign a present value to the obligation which she holds. *Burnett* v. *Logan,* 283 U.S. 404. In *Warner* v. *Walsh,* 15 F. (2d) 367, the widow sold her rights for an annuity. The same was true in *Allen* v. *Brandeis,* 29 F. (2d) 363. But in the case at bar there was no sale for a money-measured price, but an exchange of legal estates for an equitable estate in an investment. What comes from it as income is income to Mrs. Woodward and not capital, just as it is income and not bequest to her children. *Irwin* v. *Gavit,* 268 U.S. 161; *Heiner* v. *Beatty,* 17 F. (2d) 743, affirmed 276 U.S. 598.

Although the court below expressly refused to decide the question whether the widow was taxable, there is much in its opinion (see R. 24–25) which indicates its agreement with the views expressed by the Court of Appeals of New York and by the Circuit Court of Appeals for the Fifth Circuit in the opinions which have been quoted above. We contend that the question whether the widow is taxable is necessarily involved in this case and cannot be avoided as the court below endeavored to do. If our argument in Point II (*supra,* pp. 11) is sound, then the trustee is not entitled to the deduction unless the widow is taxable, so that the question whether the widow is taxable must be decided before it can be determined whether the trustee may deduct the payments.

We submit that the reasoning advanced in the quotations set out above is sound. The widow does not "purchase" in any true sense; she "elects."[5] If, for example, she chose to take her dower interest instead of an interest in the trust created by her husband's will, no one would suggest that she was a "purchaser" of her dower in the contract sense. Moreover, even if she is regarded as a purchaser, it cannot be overlooked that what she has purchased is an equitable life estate in property. If she had purchased bonds, she plainly would be taxable on the income from those bonds. No one could successfully contend that the interest should be free from tax until the payments in the course of time aggregated the amount paid for the bonds. The fact that she may be regarded as a purchaser of her equitable interest in the trust property is no reason why she should not be subjected to taxation on the income produced by that interest in property.

Accordingly, we submit that it should be held that the widow is taxable on the payments she receives in cases such as this. If this contention is correct, it follows as a consequence that the trustee may deduct the payments so made, at least if the widow does in fact pay the tax on the income she receives.

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[5] Cf. Section 804 of the Revenue Act of 1932 which provides for purposes of the estate tax that "a relinquishment * * * of dower" or similar interest "shall not be considered to any extent a consideration 'in money or money's worth.'"

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed, unless it be concluded that the income in question is taxable in full to the widow.

Respectfully submitted.

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OCTOBER 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or dis-

tributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year; * * *. (U.S.C., Title 26, Sec. 960.)

Section 219 (a) (2) and (b) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U.S.C.App., Title 26, Sec. 960), is identical with the corresponding provisions of the Revenue Act of 1924.

Purdon's Pennsylvania Statutes Annotated, Title 20, Decedents' and Trust Estates:

SEC. 31. *Widow's share in lieu of dower.*—The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seised; * * * aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seised. * * * (1917, June 7, P.L. 429, § 3.)

SEC. 261. *Spouse can elect to take against will.*—When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: * * * (1917, June 7, P.L. 403, § 23 [a].)

U.S. GOVERNMENT PRINTING OFFICE: 1939